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No. 01-618

IN THE

Supreme Court of the United States

ERIC ELDRED, ET AL.,

Petitioners,

v.

JOHN D. ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RECORDING ARTISTS COALITION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. Introduction 3

II. The CTEA Promotes the Useful Arts and Sciences by Providing Economic Incentive to Living Artists to Preserve and Create Art. 4

III. The CTEA Promotes the Useful Arts and Sciences by Providing Economic Incentive to the Artist's Heirs to Preserve and Create Art. 6

CONCLUSION 8

TABLE OF AUTHORITIES

Cases:

Eldred v. Reno, 239 F.3d 372 (D.C.Cir. 2001) 3. 4

Statutes and Legislative Materials:

Copyright Act of 1976 (as amended), 17 U.S.C.§ 101 et seq. 1

Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) 1

STATEMENT OF INTEREST[1]

This brief *amicus curiae* in support of Respondents is submitted by the Recording Artists Coalition ("RAC") pursuant to Rule 37 of the Rules of this Court. Founded in 1998, RAC is a non-profit public advocacy organization comprised of over 130 well-known featured recording artists, including Tony Bennett, Clint Black, Alanis Morissette, Jimmy Buffet, Sheryl Crow, Don Henley, Billy Joel, Stevie Nicks, Bonnie Raitt, Bruce Springsteen, and Trisha Yearwood. RAC is primarily concerned with business and political issues affecting the interests of featured recording artists, both on a federal and state level. RAC urges the Court to uphold the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

Featured recording artists create sound recordings. Pursuant to the U.S. Copyright Act they are, in most instances, the original authors and owners of sound recording copyrights.[2] The Sony Bono Copyright Term Extension Act of 1998 ("CTEA")[3] provides featured recording artists, their assigns, successors, and/or heirs, an additional 20 years of copyright protection for sound recordings created prior to

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[1] No counsel for a party authored this brief in whole or part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief. The parties have consented to filing of this brief.

[2] Copyright Act of 1976 (as amended), 17 U.S.C., §§114 et seq.

[3] Pub. L. No. 105-298, 112 Stat. 2827 (1998). The CTEA may be particularly valuable to sound recording artists as opposed to other types of artists because, although the issue is not yet settled, it appears that sound recordings do not qualify as works for hire, so sound recording artists are entitled to the so-called "termination right" under the Copyright Act of 1976, 17 U.S.C. §§304 et seq.

and after the passage of CTEA If this Court rules in favor of Petitioners, featured recording artist's copyright ownership rights would be adversely affected. Such a ruling would also act as a disincentive for recording artists and their progeny to create new and enhance already existing sound recordings.

SUMMARY OF ARGUMENT

The CTEA is constitutional because it encourages both artists and their heirs to preserve and enhance existing art and to create new art.

Artists respond to economic incentives. Living artists know that when a work already created is granted an additional 20 years of protection the artist has an asset of greater value. The additional protection gives the artist an incentive not only to create new art but to preserve and enhance the already created art for himself and his heirs. Artists know, or at least believe, that the public domain industry does not preserve and enhance art as well as heirs do.

The heirs of living artists do not just reap the benefits of the artists' work. They maintain the value of the art and sometimes add new works of art based on the deceased artists' work. The example of Eva Cassidy, an artist obscure at her death, whose world-wide reputation was created by her heirs after her death, illustrates this point. A second example is Natalie Cole's digital creation of Grammy award-winning duets with her father, Nat King Cole, 40 years after the original recordings were made.

ARGUMENT

I. INTRODUCTION

Petitioners, and *amici* supporting Petitioners, argue that the CTEA's retroactive grant of a twenty year extension to already existing copyrights does not promote the useful arts and sciences, because the public receives nothing in return. Therefore, Congress has exceeded its Constitutional authority to create copyright monopolies for a "for limited Times" "to promote the Progress of Science and useful Arts." Petitioners' Brief, pp. 2, 23-28; see Petition for Certiorari, p. 6, n.3; Brief of American Association of Law Libraries, et al., in Support of Petition, p. 3.

RAC submits this brief to show how CTEA's copyright extension for both pre-existing and future works motivates recording artists (as well as all authors of copyrightable work) and their heirs to create new works and to enhance pre-existing works. Thus, even if the court of appeals' primary holding, that the CTEA is constitutional - whether or not it promotes the useful arts and sciences - is wrong, the judgment of the court of appeals should be affirmed because its alternative holding, that Congress had a basis for finding that CTEA promotes the useful arts and sciences, is clearly correct.[4]

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[4] See Eldred v. Reno, 239 F.2d 372, 378- 380 (D.C.Cir. 2001).

II THE CTEA PROMOTES THE USEFUL ARTS AND SCIENCES BY PROVIDING ECONOMIC INCENTIVE TO LIVING ARTISTS TO PRESERVE AND CREATE ART.

While it is romantic to conjure up the image of the "starving artist" creating art in the face of abject poverty, as those who work with artists know quite well, the reality is that an artist will only devote himself to art so long as the art provides remuneration for the basic necessities of life and. in most cases, for his or her progeny after the artist is gone. Whatever else it may be, art is almost always a business.

Even the Petitioners appear to concede that providing an additional 20 years to works yet to be created is constitutionally valid and defensible. However, they do not accept, nor does Judge Sentelle in his dissent accept,[5] the premise that adding an additional 20 years to works already created provides motivation to a living artist.

RAC cannot agree. A living artist will surely recognize that when a work already created is granted an additional 20 years of protection that additional protection increases the present value of the asset as well as the value of the asset that the artist leaves to his heirs. The artist will also recognize that the heirs will have additional time and incentive to maintain and enhance the quality of the art and the artist's legacy. The increase in the value of the art, even though already created, will - simply as a matter of economic rationality - motivate the artist to preserve and enhance it. Better care is usually taken of more valuable than less valuable possessions.

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[5] Eldred, supra, at 380-384.

In RAC's view, providing an artist or an heir with additional income based on his art will almost always encourage the artist or heir to create additional and preserve existing art. Whether the artist is dead or alive, or whether the art has already been created or will be created, without hands-on maintenance by the artist or his heirs, the value of art will not be maximized.

Allowing works to fall into the public domain, on the other hand, rarely enhances the quality of a work of art or the legacy of any particular artist.[6] The public domain industries show little interest in maintaining quality in an artist's original or derivative works or in perpetuating the historical legacy of an artist. Such industries, unprotected by an exclusive license, are naturally interested in short term profit, not in nurturing and enhancing the value of a work of art over time.

Even if this perception of the public domain industries is wrong, it is a perception generally shared by recording artists. Thus, the realization that copyright law now provides an additional 20 years of protection spurs the artist not only to create new art but to preserve and enhance existing art.

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[6] Although not in issue here, falling into the public domain also has a questionable effect on a work's level of distribution. Many works of art simply disappear without the support of an interested heir of the artist.

III. THE CTEA PROMOTES THE USEFUL ARTS AND SCIENCES BY PROVIDING ECONOMIC INCENTIVE TO THE ARTIST'S HEIRS TO PRESERVE AND CREATE ART.

Petitioners ignore the value that heirs often add to the value of an artist's body of work.[7] Heirs license the art and authorize the creation of derivative works. Heirs, or those working on behalf of the heirs, are in the best position to maintain value by judiciously licensing the art and authorizing the creation of derivative works. Much time and effort is necessary to manage the legacy of an artist. The heirs are uniquely situated with the requisite knowledge and familial interest to maximize the value of the artist's estate and enhance the legacy of the artist. The CTEA encourages this activity.

To illustrate this point, the Court should take notice of Eva Cassidy. Eva Cassidy has recently become an international star. Her album Songbird was the number one album in the United Kingdom for weeks in 2001. Her recorded performance of the song "Somewhere Over the Rainbow" also attained number one status in the United Kingdom in 2001 and was voted by the BBC audience one of the 100 most important recorded performances of the 20th Century. Cassidy has also attained a legendary status in the United States, and her legacy continues to grow. See www.evacassidy.org.

The relevant point about Eva Cassidy is that she has been dead for almost six years – having been struck down by cancer at the age of 33. When she died, she was an obscure,

[7] See Petitioners' Brief, p. 25-26, suggesting that seeking to extend the term of copyright for already existing work is "rent-seeking" behavior.

though greatly loved and respected, Washington DC based, recording artist, having released only one solo album, Eva Cassidy Live at Blues Alley. Her awesome talent was appreciated by very few. The album, Songbird, consisting in part of tracks not yet released when she died, was a work of art created in part by her heirs after her death.

If not for the tireless work of her heirs (in this instance her parents), her producer, her band, and the independent record company releasing her product in new and varied forms, the world, we submit, would never have taken notice of or been exposed to this extraordinary talent. Had her legacy of sound recordings fallen into the public domain, her heirs would have lacked the economic incentive to work to preserve her artistic legacy, and the licensee record company would not have invested the necessary money

The CTEA provides heirs not only with incentives to preserve works already created but not yet published by deceased artists but to create additional works and derivatives of published works. Examples are the audio and visual performances of Natalie Cole in "Unforgettable" (1991) and "When I Fall in Love" (1996), which she created by digitally mixing her performances with performances more than 40 years before of her deceased father, Nat King Cole. What had previously been a solo performance became a duet between father and daughter. Natalie Cole won Grammy awards for both performances. See www.grammy.com. We think it fair to say that Nat King Cole's legacy was greatly enhanced by this collaborative effort.

CONCLUSION

For the reasons set forth above, the CTEA promotes the useful arts and sciences. It is therefore constitutional. In consequence, this Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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